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IN THE

Supreme Court of the United States

October Term, 1982

ALBERT EUGENE CARMICHAEL, JR.,
and JOE GRADY FLOWERS,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RONALD P. FISCHETTI
1290 Avenue of the Americas
New York, New York 10104

HENRY HAMMER
1019 Assembly Street
Columbia, South Carolina 29201
Counsel for Petitioners

Of Counsel:

MARK POMERANTZ
1290 Avenue of the Americas
New York, New York 10104

MORRIS D. ROSEN
P.O. Box 893
Charleston, South Carolina 29402

JOHN C. LINDSAY
104 Market Street
Bennettsville, South Carolina 29512

Dated: November 15, 1982

Question Presented

Whether 42 U.S.C. § 1973i(c), barring payments for votes in elections held solely or in part for the purpose of electing federal officers, applies to payments made for votes in a local sheriff's race, absent proof of an intended or actual impact on any federal election contest and absent proof that any of the paid voters cast a vote for a federal candidate?

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The petitioners Albert Eugene Carmichael, Jr., and Joe Grady Flowers respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case.

Opinion Below

The Opinion of the Fourth Circuit (Appendix A, *infra*, pp. 1a - 17a) has not yet been officially reported.

Jurisdiction

The judgment of the Fourth Circuit was entered on August 12, 1982. A timely petition for rehearing was denied on September 16, 1982 (App. B, *infra*, p. 18a), and this petition for certiorari was filed within 60 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

United States Code, Title 42:

§ 1973i. Prohibited acts

* * * *

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

Statement of the Case

Albert Eugene Carmichael, Jr., a former member of the South Carolina State Senate, and Joe Grady Flowers, the former Mayor of Lakeville, South Carolina, were indicted in February, 1981, on federal charges relating to an alleged scheme to pay voters to cast their ballots for a particular candidate in a local sheriff's election. The thrust of the indictment was that Carmichael, Flowers, and others had attempted to gain for one Roy Lee the Democratic Party nomination for sheriff of Dillon County, South Carolina. By making payments to voters to cast absentee ballots for Lee, the indictment alleged, the defendants attempted to ensure his victory in a primary election that was held in Dillon County on June 10, 1981.

There was no allegation that the defendants had intended to "buy" votes or had engaged in any conduct on behalf of anyone other than candidate Lee. Nevertheless, the indictment charged Carmichael and Flowers with conspiring to violate and with substantive violations of 42 U.S.C. § 1973i(c), a federal statute that proscribes payments to voters in elections that are held solely or in part to select or elect candidates for federal offices such as President, Senator, or Representative. In this case, the primary election in which Lee was running for the sheriff nomination was also being held to nominate candidates for federal office. Based solely on this fact, the Government chose to proceed under 42 U.S.C. § 1973i(c) despite the defendants' lack of intent to affect any federal contest.

The proof at trial detailed a plan to secure Lee's nomination for sheriff by paying voters an average of $5 to obtain and complete absentee ballots naming Lee as their choice. In support of the substantive counts of the indictment, a number of individual voters testified about the payments they received for their absentee ballots. There was no proof that *any* of the voters who received money cast a vote for any candidate for federal office; each voter testified only about the vote he or she had

cast for Roy Lee. None of the witnesses testified that they were solicited to vote or did vote for any candidate other than Lee. Indeed, to the extent that there was any evidence on this score, it was that no such vote had been cast.[1]

Citing the Government's failure to prove that any of the "paid" voters had voted for a federal candidate, the defendants moved for dismissal of the charges. The trial judge ruled, however, that the mere presence of federal candidates on the ballot was sufficient to establish federal criminal jurisdiction and to bring the defendants' activities within 42 U.S.C. § 1973i(c). Accordingly, the jury was instructed that the payments need not have generated any votes for a federal candidate. To convict, the jury need have found only that payments were made to voters and that federal candidates were on the ballot.

Following its receipt of these instructions, the jury convicted Carmichael and Flowers on all counts. Carmichael was sentenced to five years' imprisonment on the vote-buying charges and to a consecutive five-year term on a related charge of obstruction of justice. Flowers received a four-year prison term on the vote-buying charges and a consecutive three-year term for obstruction.

Both defendants appealed their convictions to the Fourth Circuit. They contended on appeal that the mere presence of federal candidates on the ballot could not support their conviction under 42 U.S.C. § 1973i(c) for conduct that impacted solely on a local election, and that some impact on or threat to the integrity of a federal race had to be alleged and proved.

The Court of Appeals rendered a published opinion affirming the convictions on August 12, 1982. The Court

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[1]For instance, when asked about the absentee ballot that was cast by Dixie Johnson, one witness stated that Johnson's only vote had been for Roy Lee.

apparently agreed that the mere presence of federal candidates on the ballot did not support federal prosecution; it ruled that the evidence had to show, at a minimum, that the defendants' vote-buying activity had exposed the federal contests to the "possibility of corruption." (App. A, *infra*, p. 9a). The Court, however, went on to examine the evidence adduced at trial and to conclude that a "possibility of corruption" did exist in this case. The panel ignored the fact that this issue had not been tried to the jury, and moreover found the "possibility of corruption" in the total absence of evidence that any "paid" voter had voted for a federal candidate.

Reasons for Granting the Writ

The net effect of the decision of the Court of Appeals is to affirm federal convictions for voting fraud based on conduct that was intended to affect and did affect only a local sheriff's election. This result flies in the face of a number of decisions of this Court holding that such conduct is beyond the sphere of Congressional regulation, and raises an issue identical to the one this Court decided to consider and then did not reach in *Anderson v. United States*, 417 U.S. 211 (1974). Moreover, the Fourth Circuit's attempt to find a federal "nexus" for the crimes charged directly conflicts with this Court's prior holding that federal jurisdiction in a case such as this one requires, at a minimum, some proof that a vote or votes were cast for a federal candidate. *Blitz v. United States*, 153 U.S. 308, 314-15 (1894). Accordingly, the writ of certiorari should issue so that the Fourth Circuit's erroneous reading of 42 U.S.C. § 1973i(c) may be corrected and that important statute freed of any constitutional infirmity.

I

The Decision Below Conflicts with the Decisions of This Court Confining Federal Jurisdiction to Conduct Having an Actual or Potential Impact on Federal Elections.

In a line of decisions extending back for over 100 years, this Court has made it clear that Congress does not have unlimited Constitutional authority to regulate the conduct of local elections. As early as *United States v. Reese*, 92 U.S. 214 (1875), the Court decided that, except insofar as necessary to enforce the guarantees against racial discrimination contained in the Fifteenth Amendment, Congress must leave the policing of state and local elections to state and local authorities. To be sure, Congress has the power to regulate elections for federal officials, and it retains that power where an election concerns both local and federal offices. Even in such "mixed" elections, however, the Court has made it clear that acts touching only upon local contests may not be the subject of Congressional intervention. *Ex parte Siebold*, 100 U.S. 371, 393 (1879) ("If for its own convenience a State sees fit to elect state and county officers at the same time and in conjunction with the election of Representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they will be amenable to federal jurisdiction . . . ."). *See also, e.g., Blitz v. United States, supra*, 153 U.S. at 314-15 ("Voting, in the name of another, for a state officer, cannot possibly affect the integrity of an election for Representative in Congress. With frauds of that character the national government has no concern . . . ."); *Oregon v. Mitchell*, 400 U.S. 112, 129-30 (1970).

II

The Decision Below Raises an Important Issue of Federal Law Which Has Not Been and Should be Resolved by This Court.

In light of these and other precedents, it is apparent that any attempt to apply a federal criminal statute to the regulation of purely local election irregularities must raise serious statutory and constitutional questions. Indeed, this Court granted certiorari in *Anderson v. United States*, 417 U.S. 211 (1974), to consider the propriety of the Fourth Circuit's application of 18 U.S.C. § 241 to a conspiracy to cast false votes in a state or local election. After reviewing the record, the Court concluded that the conspiracy embraced fraudulent voting in federal races as well, and therefore decided not to reach the question upon which certiorari had been granted. 417 U.S. at 222-28. The Court's initial decision to hear the case, however, reflects the serious questions raised by the decision to apply a federal criminal statute to local election fraud. As Justice Douglas noted in dissent in *Anderson*, such a decision "reaches to the very heart of federal-state relations." 417 U.S. at 244.[2]

This case raises issues virtually identical to those upon which the Court granted certiorari in *Anderson*. The legislative history of 42 U.S.C. § 1973i(c), like that of 18 U.S.C. § 241 (*see Anderson*, 417 U.S. at 237-43), clearly shows that Congress was aware of the constitutional problems inherent in its regulation of local elections, and sought to restrict the application of the statute to cases involving an impact on federal races. The precursor of § 1973i(c) was not included in the original Senate version of the Voting Rights Act of 1965, but was proposed by Senator Williams during the debate

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[2]Justice Douglas, joined by Justice Brennan, concluded in *Anderson* that the conspiracy had not included federal vote fraud, and that 18 U.S.C. § 241 did not reach conspiracies to interfere with local and state elections. 417 U.S. at 228-45. Accordingly, he would have reversed the convictions in that case.

on the Senate floor. 111 Cong. Rec. 7890, 8433 (1965). Senator William's proposal, however, applied by its terms to all elections in all states, prompting various senators to question its constitutionality. 111 Cong. Rec. 8431-33. Senator Hart, for instance, noted that the question "whether Congress has the power to insure fair election procedures in State and local elections, unless they are related to insuring the guarantees under the 14th and 15th Amendments, is a very open one and a very serious one." 111 Cong. Rec. 8433 (1965).

In order to allay such fears, Senator Ervin proposed a jurisdictional amendment limiting the scope of the prohibition in what became § 1973i(c) to elections for federal officers, including presidential electors, Senators and Representatives.[3] Senator Williams concurred in the Ervin amendment, 111 Cong. Rec. 8975 (1965), and, after some technical alterations, it was enacted into law as the proviso that now appears in § 1973i(c), which restricts the statute's application to "general, special, or primary elections held solely or in part" to elect federal officers.

Despite the clear intention of the proviso, the Fourth Circuit in this case affirmed the application of the statute to conduct that had an intended and demonstrated effect only upon a local sheriff's race. The question thus presented mirrors the one upon which the Court granted certiorari in *Anderson:* In light of prior

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[3]Senator Ervin explained:

> "In my opinion Senator Williams' version of Section 1973i(c) in its present form is unconstitutional because it is not restricted to Federal elections. By the term 'federal elections,' I mean elections in which presidential electors and Members of the U.S. Senate and Members of the U.S. House of Representatives are chosen. The only effect of my amendment would be to confine the application of the amendment . . . to federal elections and thereby make it constitutional under the interpretations placed on the 15th amendment by the Supreme Court of the United States in a number of cases." 111 Cong. Rec. 8975 (1965).

precedents limiting Congressional power to regulate local elections, and legislative history suggesting that Congress intended to respect those precedents in the statute at issue, should the Fourth Circuit have applied a federal criminal law to punish activity that had no intended or actual impact on a federal election contest? *Anderson* itself establishes that this question warrants Supreme Court review.

III

The Fourth Circuit's Attempt to Find a Basis for the Exercise of Federal Criminal Jurisdiction in This Case in Itself Conflicts with Prior Decisions of This Court.

The *Anderson* Court ultimately did not have to decide the issue upon which certiorari had been granted because the evidence in that case showed that the defendants intended that false votes be cast for an entire slate of candidates, including not only the local candidate whose election the defendants were attempting to secure but candidates for federal office as well. 417 U.S. at 222-28. The same is not true here. In this case, there was absolutely no evidence that the defendants "knowingly participated in a conspiracy which contemplated the casting of . . . votes for all offices at issue in the election." *Anderson, supra,* 417 U.S. at 225. With respect to the substantive counts, there was no evidence that any of the named voters who received payments cast a vote for a federal candidate.[4]

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[4]The Court of Appeals did refer passingly to facts proved at trial which it claimed raised a "possibility of corruption" as to the federal elections. It cited the return of unsealed ballots to Flowers and the large number of absentee votes cast for incumbent John Jenrette in the House of Representatives primary contest. (App. A, *infra*, p. 9a.) There was no proof, however, that the conspiracy between Carmichael and Flowers contemplated that ballots would be returned unsealed or that absentee ballots would be cast on Jenrette's behalf. Moreover, the substantive counts rested on allegations of payments made to individual, named voters. The fact that other voters may have cast ballots for offices other than sheriff does not make up for the Government's failure to prove that the particular voters alleged to have been paid did so.

To be sure, the Fourth Circuit in this case attempted to justify the application of 42 U.S.C. § 1973i(c) to the defendants' activities in the sheriff's race by finding that their conduct exposed the federal elections as well to the unintended "possibility of corruption." (App. A, *infra*, p. 9a). This attempted justification, however, was improper on several grounds which of themselves warrant review by this Court.

In the first place, where the crime is the illegal payment of money to a voter, there can be no "possibility of corruption" of a federal race absent allegation and proof that the paid voter actually cast a ballot for a federal candidate. This is the plain thrust of this Court's decision in *Blitz v. United States, supra.* In *Blitz,* the defendant was charged with having voted for a Representative in Congress under someone else's name. The defendant had cast the vote at a "mixed" election for federal and local offices, and the proof plainly showed that he had cast more than one ballot. As to one count in the indictment, however, the Government did not allege that the defendant actually had cast his false vote for the federal candidate; it simply alleged that he had voted under another name in an election in which a congressional representative would be chosen. This Court dismissed the count, reasoning as follows:

> "Voting, in the name of another, for a state officer, cannot possibly affect the integrity of an election for Representative in Congress. With frauds of that character the national government has no concern, and, therefore, an indictment .... for knowingly personating and voting under the name of another, should clearly show that the accused actually voted for a Representative in Congress, and not simply that in voting he falsely personated another at a general election at which such Representative was or could have been chosen. In cases like the present one, it should not be left in doubt, or to mere inference, from the words of the indictment, whether the offence

charged was one within Federal cognizance." 153 U.S. at 314-15.

This holding should have been, but was not, applied by the Fourth Circuit to this case. Carmichael and Flowers were convicted of substantive violations of 42 U.S.C. § 1973i(c) based on payments made to specific voters who testified as trial witnesses. But there was no testimony from any of those witnesses that they had cast a vote for a federal candidate. Indeed, as we have noted, there was affirmative testimony that, at least in some instances, the only vote they had cast was on behalf of Roy Lee for Sheriff of Dillon County. As in *Blitz*, the "mere inference" that some of the paid voters had voted for a federal candidate should not have been sufficient to establish federal jurisdiction and to sustain the defendants' convictions. The conflict between the Fourth Circuit's holding in this case and this Court's prior decision in *Blitz* alone warrants the grant of the writ.[5]

Even putting the conflict with *Blitz* to one side, the Fourth Circuit's holding based on the "possibility of corruption" of the federal election contests in this case was badly flawed and should be corrected on

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[5]The Court of Appeals distinguished Blitz in a footnote by pointing to this Court's decision in *In re Coy*, 127 U.S. 731 (1888). (App. A. *infra*, at 10a). *Coy*, however, involved a charge that the defendants had induced election officers to violate their duty by surrendering custody of voting records to third parties before their return and tally. The Court held that this conduct had exposed the federal ballot results, as well as the state and local results, to potential alteration, and therefore upheld the exercise of federal jurisdiction. The Fourth Circuit, noting some evidence in the record that some of the ballots in this case had been delivered to Flowers unsealed, held that *Coy* and not *Blitz* should apply. Neither Flowers nor Carmichael, however, were charged with ballot tampering or with any activity relating to the handling of the ballots. Any possibility of corruption of the federal elections flowing from this activity, therefore, could not properly have been a basis for affirming their convictions The *Blitz* Court itself distinguished *Coy* on this basis, and the same distinction applies here. Paying someone to vote for a state candidate cannot possibly affect the integrity of a federal election.

certiorari. The Court of Appeals took the apparent view that criminal jurisdiction in election fraud cases depends on the evidence adduced at the trial. Thus, the Court held that a charge under 42 U.S.C. § 1973i(c) could be sustained "*when the evidence shows* . . . that [the defendant's conduct] exposes the federal aspects of the election to the possibility of corruption . . . ." (App. A, *infra*, at p. 9a, *quoting United States v. Mason*, 673 F.2d 737, 739 (4th Cir. 1982), *quoting United States v. Bowman*, 636 F.2d 1003, 1011 (5th Cir. 1981)(emphasis added)). The panel then reviewed the evidence at the Carmichael/Flowers trial and concluded that the defendants' conduct had exposed the federal election contests to potential, if not actual, corruption. (App. A, *infra*, at pp. 9a—10a).

By deciding the case in this manner, the court below, in addition to everything else, affirmed the defendants' convictions on the basis of dubious factual findings that were never made by or even submitted to the jury. The factual question whether the defendants' conduct in this case exposed any federal race to potential corruption was removed from the case when the trial judge refused to charge the jury that actual, intended, or threatened impact on a federal election contest was an element of the offense. Instead, the judge, over the defendants' vigorous objections, charged the jury that the mere presence of the federal candidates on the ballot was of itself sufficient to convict if payments had been made to any voters. With the case in this posture, it was improper for the Court of Appeals to have affirmed the defendants' convictions based on its own appellate fact-finding. As this Court held in *Chiarella v. United States*, 445 U.S. 222 (1980), a criminal conviction may not be affirmed "on the basis of a theory not presented to the jury . . . ." 445 U.S. at 236, citing *Rewis v. United States*, 442 U.S. 100, 106 (1979). Likewise here, the question whether the defendants' conduct had potentially corrupted a federal race should have been presented to the jury for decision, especially since the defendants contended throughout that their actions could not possibly

have affected the federal contests that occurred together with the local sheriff's election.

In short, this case involves defendants who were convicted of conspiring to violate 42 U.S.C. § 1973i(c) absent any proof that their conspiracy contemplated the casting of so much as a single "paid" vote on behalf of any federal candidate. They were convicted of substantive violations of 42 U.S.C. § 1973i(c) based on payments to individuals who, so far as the trial proof showed, cast votes only in a local sheriff's race. For the reasons stated, these convictions raise substantial questions of federal-state relations that should be reviewed by this Court on certiorari.

Conclusion

A writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

RONALD P. FISCHETTI
1290 Avenue of the Americas
New York, New York 10104

HENRY HAMMER
1019 Assembly Street
Columbia, South Carolina 29201
Counsel for Petitioners

Of Counsel:

MARK POMERANTZ
1290 Avenue of the Americas
New York, New York 10104

MORRIS D. ROSEN
P.O. Box 893
Charleston, South Carolina 29402

JOHN C. LINDSAY
104 Market Street
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